

**L.A. Food and Vending Services, Inc. and Stanley Sutton and Matthew Ackles and Local 485, International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, Party to the Contract.** Cases 29-CA-18257, 29-CA-18195, 29-CA-18339, 29-CA-18433, and 29-CA-18483

February 29, 1996

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

Administrative Law Judge Eleanor MacDonald has found that the Respondent committed numerous violations of Section 8(a)(1), (2), (3), and (4) of the Act.<sup>1</sup> There are no exceptions to these findings. The General Counsel has filed a single, limited exception alleging that the judge's recommended Order and notice do not refer to the Respondent's violation of Section 8(a)(4). The Board has considered the decision and the record in light of the exception and brief and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.<sup>2</sup>

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, L.A. Food and Vending Services, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> On November 29, 1995, the judge issued the attached decision. The General Counsel filed an exception and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> Contrary to the General Counsel, we find that the recommended Order and notice do make adequate reference to the Respondent's violations of Sec. 8(a)(4). See Order par. 1(e) and the fifth injunctive paragraph of the notice.

*Ann Goldwater, Esq.*, for the General Counsel.  
*Cynthia Licul, Esq.* and *Alan Pearl, Esq. (Portnoy, Messinger, Pearl and Associates, Inc.)*, of Westbury, New York, for the Respondent

## DECISION

### STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn and New York, New York, on June 13, 14, and 15, 1995. The consolidated complaint alleges numerous violations of Section 8(a)(1), (2), (3), and (4)

of the Act.<sup>1</sup> The Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in July 1995, I make the following<sup>2</sup>

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a New Jersey corporation with its principal office in Somerville, New Jersey, is engaged in the preparation, sale, and service of food and beverages and the operation of cafeterias including the United States Postal Service General Mail Facility cafeteria at Forbell Street, in Brooklyn, New York. Respondent annually receives at its various places of business in the State of New York goods valued in excess of \$50,000 from other enterprises located within the State of New York; each of these other enterprises purchases and receives these goods directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits, and I find, that Local 485, International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO (Local 485) and Hotel Employees and Restaurant Employees Union, of New York, New York and Vicinity, Local 100, AFL-CIO (Local 100) are labor organizations within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. The Facts

##### 1. Background

The cafeteria at the Postal Service Brooklyn General Mail Facility has been run by various private contractors. At the beginning of February 1994, Respondent began operating the cafeteria. Francis J. Duffield, the regional food service director for Respondent, oversaw the cafeteria operations; in February, he visited the facility almost daily, but as time went on Duffield spent less time at the Brooklyn location. When Respondent took over operation of the cafeteria it was informed by the Postal Service that it must pay an hourly wage of \$13.30 to cafeteria workers. This wage is much higher than that normally paid to similar employees and the amount of labor costs incurred by Respondent threatened the profitability of the enterprise. Respondent learned that it could pay lower wages by entering into a collective-bargaining agreement that set forth a different wage rate. In order to obtain an agreement for lower wages, Respondent contacted Local 485. Respondent admits that in March 1994, it granted recognition to Local 485 as the exclusive bargaining representative of the cafeteria workers in the Brooklyn General Mail Facility. A collective-bargaining agreement was signed with effective dates from April 8, 1994, to April 8, 1997. This contract provided wages for the cafeteria workers in a range from \$6.75 per hour to \$11.50 per hour. In April 1994, Re-

<sup>1</sup> The General Counsel has withdrawn the allegations of pars. 15 and 18 of the complaint.

<sup>2</sup> Certain errors in the record are noted and corrected.

spondent began informing its employees that they would be represented by Local 485 and that employees had to sign authorization cards for Local 485 within 30 days or face termination. On April 18, 1994, managers were instructed to give their employees a copy of the agreement between Respondent and Local 485 and to have each employee sign an authorization card for the Union. A number of employees who were not satisfied with this state of affairs contacted Local 100. Utility worker Matthew Ackles organized meetings of employees with Local 100 and distributed authorization cards. Ackles was questioned about the theft of \$250 in cafeteria funds on April 27, 1994. On April 28, according to the General Counsel, Ackles was discharged. Respondent contends that Ackles resigned. On May 3, Ackles filed an unfair labor practice charge alleging that Respondent unlawfully assisted Local 485 and discriminatorily discharged him. Ackles was reinstated on June 6, 1994, and he continued to campaign for Local 100. Local 485 repudiated the contract and disclaimed interest in representing the employees by letter of June 7, 1994. Ackles filed further charges on June 22 and August 1 and 23.

The cafeteria, which was open 24 hours a day, operated on three tours. Tour 1 began at 11 p.m. and continued until 7 a.m. Tour 2 lasted from 7 a.m. to 3 p.m. The manager of tour 2, Javier Lopez, served as the chief liaison between Duffield and the managers of the other tours. The first manager of tour 1 was Stanley Sutton who was discharged on April 22, 1994. The General Counsel contends that Sutton's discharge took place because he failed to follow Respondent's instructions to make the employees on his tour sign authorization cards for Local 485. Respondent argues that Sutton's effectiveness as a manager had been declining and that he was discharged for poor performance. After Sutton was discharged, Raymond Moran was briefly the manager of tour 1 and then Rhoda Johnson assumed this position on June 3, 1994. The General Counsel contends that Johnson and Lopez saw to it that Ackles accumulated a number of written warnings sufficient to justify his discharge on August 23, 1994.

Respondent ceased operating the cafeteria at the Brooklyn facility on May 31, 1995.

## 2. Matthew Ackles

Utility worker Matthew Ackles testified that his duties were to make coffee, make Kool Aid, put out pastries, put out sodas, and mop the floor in the front serving area of the cafeteria. Ackles added that everything in front was his station and his duty.<sup>3</sup> Ackles recalled that sometime in April 1994, Regional Manager Duffield and Tour 2 Manager Lopez met with the employees. Duffield said that Respondent could not continue paying the employees \$13.30 per hour and that it had called in Local 485 and hired two shop stewards. The employees had 30 days to sign authorization cards for Local 485 or they would be terminated. The next week Lopez sent Ackles into his office where the latter saw Jose Torres from Local 485. Torres told Ackles that Local 485 was a good union and he showed Ackles a contract and a union card and said that he had 30 days to sign. Ackles

flipped through the pages of the contract and saw things that he did not like; he told Torres that he would think about it. The following day, Ackles spoke to two coworkers during lunch: when these employees wondered whether Respondent could indeed bring in a union without consulting the employees, Ackles said he would call Local 100. The next day, having met with a Local 100 representative, Ackles handed out authorization cards for Local 100 to several employees near his station and in the locker room. A day after he handed out the cards, Lopez called Ackles into the office and told him "that's not smart what you're doing. About you handing those union cards out." Lopez informed Ackles that word had gotten back to the Local 485 shop stewards and he told Ackles to be careful. I credit Ackles' testimony and I find that Lopez' comment that Ackles was not smart and should be careful constituted a threat of reprisal for his activity in handing out cards for Local 100. Respondent thus violated Section 8(a)(1) of the Act.

Ackles testified that on April 27, 1994, Lopez called him at home and accused him of taking \$250 in cash from the office. Ackles denied taking any money. Lopez said that "Satch," a worker who filled the concession machines in the cafeteria, had seen him. Lopez told Ackles that if he did not return the \$250 he would be fired. Ackles repeated his denial of the theft and Lopez told him not to punch in the next day if he did not have the cash. The next morning, Ackles met with Lopez in the office. Lopez repeated his accusation and repeated Satch's allegation that he saw Ackles steal the money. Ackles repeated his denials and said that Satch was lying. Lopez said if Ackles did not have the \$250 he would be fired, and Ackles said that Lopez might as well go ahead and fire him. Ackles threatened to take Lopez to court because he "had a lot on him." This angered Lopez who said, "I'll kick your ass if you do" and then pushed Ackles. No police proceedings were ever brought against Ackles concerning the \$250.<sup>4</sup>

Lopez, who was still employed by Respondent at the time of the instant hearing, testified that he never accused Ackles of taking the \$250; Lopez stated that he only asked Ackles whether he had taken the money. According to Lopez, when he called Ackles at home, Ackles denied taking the money and he denied taking it the next morning when Lopez spoke to him again. Lopez testified that he did not tell Ackles that Satch had accused Ackles of taking the cash. Lopez' testimony about the events surrounding the disappearance of the \$250 is a confused narrative that does not relate with specificity where Lopez was when the money disappeared, who else among the cast of characters that Lopez placed in the vicinity had access to the cash, and what statements were made to Lopez by other persons. In fact, Lopez testified that he could not even recall whether he had asked Satch if he had taken the money himself. Lopez denied that he discharged Ackles. Lopez testified that the morning after the money was misplaced, Ackles again said that he did not take the money and then told Lopez, "You do what you have to do, I know what I am going to do." Lopez recalled that Ackles mentioned the "Labor Department" on this occasion. According to Lopez, Ackles resigned and signed a document to the effect that the resignation was for personal reasons. This document, in Lopez' handwriting, is dated April 29,

<sup>3</sup> When Ackles was hired, his hours were from 7 to 11 a.m. In March 1994, Ackles' hours were changed so that he worked from 6 to 10:30 a.m.

<sup>4</sup> Satch did not testify here.

1994; it states that the resignation is as of April 28, 1994. Above the resignation language is a paragraph stating that Ackles received his check for the period ending April 22, 1994, and turned in his I.D. card and an access card. The original of this document, Respondent's Exhibit 1, was not produced by Respondent. Ackles denied signing Respondent's Exhibit 1 in its present form. He recalled signing a paper to get his last check but he did not see that it mentioned a resignation.

I credit Ackles' version of the events surrounding the loss of \$250 in cash from the cafeteria. Lopez gave a confused narrative and his version of the events would have me believe that Ackles resigned even though he had not been accused of stealing the money. Lopez recalled that Ackles mentioned the "Labor Department" during this meeting and he did not deny threatening to kick Ackles nor did he deny pushing him. Respondent's brief points out that Ackles' testimony is itself not free of contradictions. It is true that both Lopez and Ackles were confused witnesses who changed their testimony, and at times both seemed willing to say anything that would bolster their positions in the instant hearing whether or not they had any recollection that the events actually happened as they were relating them under oath. However, I must evaluate the testimony of both these witnesses and make a judgment as to which is most reliable. In this instance, Ackles' story about the telephone call and meeting with Lopez has the ring of truth and makes more sense than Lopez' story that Ackles resigned a job for no apparent reason. I find that Lopez told Ackles that he would be fired if he did not produce the \$250 and that Lopez discharged Ackles on April 28, 1994. Lopez drew up a document that stated that Ackles had resigned and Ackles signed this. I have credited Ackles' testimony that Lopez told him that it was not smart to hand out cards for Local 100 and that the word was getting out. Lopez knew that instead of following instructions and signing an authorization card for Local 485, Ackles was trying to organize the employees for Local 100. Respondent wished its employees to sign up with Local 485, and Lopez' comments demonstrate antiunion animus directed against Ackles' activities on behalf of Local 100. I find that Respondent discharged Ackles on April 28, 1994, because he supported Local 100. Thus, Respondent violated Section 8(a)(3) and (1) of the Act.

Ackles testified that when he returned to work on June 6, 1994, Lopez told him that the Company "can't stand you" because he had gone to the Labor Board without confronting the Company. Lopez advised Ackles, "watch your p's and q's." I credit Ackles' account of this exchange. Lopez' statement amounted to a threat of reprisal against Ackles for filing a charge. Respondent thus violated Section 8(a)(1) of the Act.

A few days later, Ackles again gave out Local 100 authorization cards in the cafeteria and in the lobby of the building. Around June 21, he gave the employees Local 100 buttons. Lopez told him, "this is not going to work those buttons you have people wearing."<sup>5</sup> I credit Ackles' testimony about this conversation. I find that Lopez' statement to Ackles implied that it was futile for employees to select their own bargaining

representative. Thus, Respondent violated Section 8(a)(1) of the Act.

According to Ackles, in the last week of June as he was preparing to take some fellow employees to Local 100, Lopez asked him how much it cost to get into the Union and how many people were going to the Union. Lopez denied asking this question. I credit Ackles' testimony about this occasion. In view of the prior unlawful acts engaged in by Respondent, I find that Lopez' questions were coercive and that Respondent violated Section 8(a)(1) by interrogating Ackles about his activities in support of Local 100.

Ackles testified that customers regularly spoke to him. Although Ackles' duties did not involve customer service, he occasionally fielded customers' questions about the menu. Ackles said that after his reinstatement on June 6, 1994, a customer had yelled at him and he had talked back. Lopez then instructed him not to argue with the customers. Ackles testified that even before this incident, Lopez was always telling him not to speak to customers. Ackles also testified that no restriction was placed on his ability to speak to customers until after the incident with the customer. I do not credit Ackles' testimony on this point because it is confused and inconsistent, and I decline to find that Respondent harassed Ackles in violation of the Act as the General Counsel alleges.

Ackles testified that at a meeting attended by Duffield, Lopez, and other managers and employees, Ackles informed Duffield that he wanted to organize with Local 100 because it was a good union that would protect the employees. Duffield remarked that the Company did not have a contract with Local 100. The next day, Lopez told Ackles to clean the coffee machine, the soda machine, and the back of the kitchen. Lopez said that if the job were not done in a certain time, Ackles would be written up. Ackles protested that he could not do all that work in 4 hours. In fact, Ackles did all of the work except mopping the back of the kitchen. The next morning, Lopez gave Ackles a warning notice dated July 14, 1994, which stated that Ackles had failed to clean the coffee urn despite being asked to do so 2 days in a row. Ackles refused to sign the warning because it was not true. Ackles testified that he had in fact cleaned the coffee machine.<sup>6</sup> I credit Ackles concerning this incident; he recalled the warning notice and testified coherently concerning the relevant events. Moreover, the notice was issued right after Ackles told Lopez and Duffield that he was continuing his efforts on behalf of Local 100. Respondent had already demonstrated its hostility to Ackles' support of Local 100. I am convinced that Respondent issued the July 14 warning to Ackles because it wished to discourage his activities on behalf of Local 100, because he was continuing to file charges under the Act and because it had determined to discharge him. Respondent thus violated Section 8(a)(3), (4), and (1) of the Act. Soon after this, Lopez told Ackles that the other employees could not stand him and that they were stabbing him in the back. Although Ackles asked Lopez which employees he was referring to Lopez refused to tell him. The General Counsel alleges that Lopez' statement was part of a campaign of harassment against Ackles because he supported

<sup>5</sup> Ackles testified that he replied to the effect that Local 485 had been put in without notice to the employees.

<sup>6</sup> The notice stated that it was for offense number 1. Respondent's system of progressive discipline provided for dismissal after three disciplinary notices and a final warning.

Local 100. I find that the comment to Ackles about other employees' feelings is too vague to sustain a finding of violation.

Ackles testified that on August 1, 1994, at 5:30 a.m. he telephoned the cafeteria and informed Manager Rhoda Johnson that he would be late due to a bus delay. Ackles stated that he takes two buses and that when he realized that the second one would be late, he called Johnson. Ackles was due to arrive at work at 6 a.m. that day, but he arrived at 7 a.m. instead. When he got there, Johnson told him to go to work. Later, Johnson gave him a warning notice for tardiness. The notice stated that he had called at 6:15 a.m. although he was due at 6 a.m., and that he did not actually come in until 7 a.m.<sup>7</sup> Ackles refused to sign the warning notice because he claimed that he had telephoned at 5:30 a.m. Lopez was there and urged him to sign the notice. Ackles testified that the next day he asked Johnson whether Lopez had made her write him up; Johnson denied that Lopez had done that but she told Ackles to watch himself "because they have a lot of other tricks up their sleeves." Ackles insisted that he had telephoned Johnson at 5:30 a.m.; however, Ackles testified that the bus trip usually takes 15 minutes and that he told Johnson that he would arrive at work at 6:30 or 6:45 a.m. Ackles did not explain why he told Johnson he would arrive in 1 hour when he had only a 15-minute trip before him. Johnson testified that Respondent's policy was to write up employees for tardiness if they were more than 15 minutes late and if they had not called in advance of their starting time to say they would be late.<sup>8</sup> Johnson was certain that Ackles had not called until after 6 a.m. and she recalled that he said he would be there around 6:30 a.m. Johnson was also certain that she could not have answered the telephone at 5:30 a.m. because she had no cashier on duty and she herself was manning the cash register far from the telephone. However, the documentary evidence shows that there was in fact a cashier on duty until 6:30 a.m. From Johnson's demeanor, I am convinced that she would not willingly give untruthful testimony and I conclude that she had no independent recollection of the events of August 1. I am also convinced that Johnson would not have written that Ackles did not call until 6:15 a.m. unless that were true. Johnson, who wrote the warning notice on August 1 soon after the events occurred, would have recalled very well at what time Ackles telephoned her. Moreover, Ackles has not explained why, if he did telephone at 5:30 a.m., it took him 1-1/2 hours to make a 15-minute trip. I find that Ackles telephoned to tell Johnson that he would be late at 6:15 a.m., that is, 15 minutes after his scheduled arrival time. I find that it is Respondent's policy to write up employees who are more than 15 minutes late if they have not called in advance of their shift to inform Respondent that they will be tardy that day. I do not find any violation surrounding the issuance of the warning notice of August 1, 1994. Further, I do not credit Ackles' testimony that Johnson warned him that Respondent had more tricks for him. Ackles' recollection of this event is too confused and inaccurate to provide the basis for any finding of unlawful activity.

Lopez testified that on August 17, 1994, he gave Ackles a final warning. This typed memorandum, dated August 15,

recites that Ackles has received "repeated warnings regarding tardiness and failure to follow instructions" and that subsequent violations of company policy may result in termination. Lopez did not testify that any particular incident prompted the issuance of this warning. Indeed, the memorandum was obviously not prepared by Lopez whose language skills are not consonant with the wording of the document. Lopez stated that Ackles refused to sign the warning and that he had it witnessed by employee Juan Garcia. Ackles testified that he had never received this written warning. Garcia did not testify here. I do not believe that Lopez had any recollection of the circumstances leading up to the preparation of this document and I do not credit Lopez' testimony that Garcia witnessed his purported attempt to hand the warning to Ackles. Given the failure of Respondent to offer any explanation for the memorandum and the absence of any evidence of repeated warnings, and given my belief that Lopez did not testify reliably, I conclude that the warning of August 15 was concocted in an attempt to follow the progressive discipline system and discharge Ackles. I find that the warning was prepared because Ackles had filed charges and because he continued to support Local 100. Respondent thus violated Section 8(a)(3), (4), and (1) of the Act.

Ackles testified that on August 22, 1994, Lopez said that he had heard the Union was coming to the building. Ackles said he knew nothing about it, but Lopez insisted that he knew the Union was coming. In fact, at 1 p.m. that day, Ackles met two Local 100 agents and brought them into the cafeteria where they met with a group of seven or eight employees for a number of hours. During the meeting, both Lopez and Duffield walked back and forth through the cafeteria glancing over to Ackles. The next day, according to Ackles, Lopez fired him. Lopez told him that Duffield did not like his bringing the Union in, but that that was not the reason he was fired. The real reason was that he had not mopped the floor in the back of the kitchen. Ackles testified that it was not part of his job to mop the floor in the rear kitchen area of the facility; that was the work of the other utility worker named Jeremy. Ackles testified that sometimes he and Jeremy helped each other but that on August 22 he had not been asked to mop the kitchen. Ackles denied being given a warning notice signed by Lopez and dated August 22, 1994, which cited his failure to mop the floor. Ackles testified at length that mopping the back area in the kitchen was not part of his duties, but that Lopez asked him to do it on occasion, especially after he returned to work in June. He stated that he performed extra services if he had the time but that he told the manager that he could not do everything in 4-1/2 hours. It is clear that Ackles resisted mopping the back area in the kitchen.

Lopez testified that Ackles worked mostly in the front area but that he was also asked to help out in back, including mopping the kitchen floor, whenever he had free time. Indeed, employees were often asked to do extra work if it was necessary. Lopez testified that on August 22, 1994, he asked Ackles to clean the floor at about 9 a.m. and Ackles agreed. Lopez worked at the cash register that morning and when he went to the back of the kitchen, he saw that the floor was still a mess. At 10:30, as Ackles was leaving, Lopez confronted Ackles with his failure to mop the floor, saying, "Thanks to clean the floor." Ackles smiled and said, "well, you know" and kept on walking. Lopez testified that he

<sup>7</sup> The notice stated that it was for offense number 2.

<sup>8</sup> The documentary evidence supports this testimony.

gave Ackles a disciplinary report and told Ackles it was for failing to clean the floor. Ackles refused to take the document, telling Lopez that he would not sign it. The disciplinary report is consistent in language with Lopez' testimony. The report states that Ackles' failure was offense number 4. Lopez' testimony was confused about the timetable for preparing the disciplinary notice. Lopez testified that he prepared the notice and completed it fully and then tried to give it to Ackles on August 22. He did not make any changes after attempting to obtain Ackles' signature on the document. Lopez also testified that after Ackles left, he went through the personnel files and saw that Ackles had three other disciplinary reports and a final warning; this meant that Ackles should now be fired so Lopez checked a box on the disciplinary notice that said "dismissal." The next day, Lopez told Ackles he was fired. Clearly, Lopez could not recall when he prepared the notice and when he tried to give it to Ackles. Lopez' testimony and the written report lead one to conclude that Lopez confronted Ackles as the latter was leaving work; however, given Lopez' testimony that he was busy on the cash register while Ackles was supposed to be mopping the floor, there would have been no time to search the personnel files and complete a disciplinary report and try to hand it to Ackles before he left the premises. This leads me to have grave doubts whether Lopez testified accurately that he tried to give Ackles the notice but that Ackles refused it. Indeed, I have concluded that Lopez was not testifying from any accurate recollection but that he was trying to tell a story that would fit Respondent's position here.

Neither Duffield nor Lopez denied that he had been in the cafeteria on the afternoon of August 22 when Ackles and other employees met with the Local 100 agents. Lopez did not deny telling Ackles that Duffield did not like his bringing in Local 100, although he gave general testimony that he never spoke to the employees about a union and that he never threatened employees.

In view of Lopez' confused and inaccurate testimony about the events of August 22 and the dismissal of Ackles, I have decided not to rely on any of his testimony about the incident. I credit Ackles' testimony that Lopez tried to find out whether Local 100 was coming to the facility that day and I find that this constituted a coercive interrogation in violation of Section 8(a)(1) of the Act. I credit Ackles that Lopez did not ask him to mop the floor on August 22 and that Ackles did not refuse to do the work. I also credit Ackles' testimony that Lopez informed him that Regional Food Service Director Duffield did not like his bringing the Union in. The disciplinary notice was based on a pretext intended to provide a basis for terminating Ackles. I find that Respondent issued the warning notice and discharged Ackles because he supported Local 100 and brought the Union to the facility for a meeting and because he was continuing to file unfair labor practice charges. Respondent thus violated Section 8(a)(3), (4), and (1) of the Act.

### 3. Stanley Sutton

Regional Manager Duffield testified that when Respondent began managing the cafeteria in February 1994, he found that Tour 1 Manager Stanley Sutton worked hard and was a

good team player.<sup>9</sup> After 4 to 6 weeks, however, Sutton stopped communicating and seemed to lose interest in his job. Duffield told Sutton that he was not satisfied with his performance. Duffield explained to Sutton that he wanted Sutton to run a cleaner operation, that he wanted to see all the employees in proper uniform, and that he wanted sales to increase on Sutton's tour that ran from 11 p.m. to 7 a.m. Duffield instructed Sutton to use the managers' daily log as a means of communication with Duffield and the other managers. Although Duffield acknowledged that Sutton responded verbally to him, Duffield wanted all the managers to communicate by means of the log.

The managers' daily log, which is in evidence here, was a notebook in which all of the tour managers and Duffield were to put comments, messages, suggestions, and information about the daily operations. From Duffield's testimony, it is clear that Duffield believed that it was of prime importance for the managers to write in the book almost daily. Duffield repeatedly urged managers to write in the log and he viewed the extent of communication in the log by each manager as a measure of the dedication and competence of that manager. Duffield read the log whenever he came to the cafeteria and he often placed into the log his own instructions and questions.

Lopez testified that he complained to Duffield about Sutton. According to Lopez, Sutton permitted his employees to leave a messy condition in the kitchen at the end of his tour and he did not see to it that fruit was displayed for sale during breakfast. Moreover, sales for tour 1 decreased under Sutton's management.<sup>10</sup> Lopez testified that he suggested to Duffield that Sutton should temporarily be placed in charge of tour 3 from 3 to 11 p.m. so that his abilities could be evaluated on a different tour. For the days of March 24 to April 1, 1994, Sutton managed tour 3 and Romnel, the usual manager of tour 3, was switched to tour 1. According to Lopez, during the time of this experiment, Romnel increased the sales on tour 1, but the sales figures for tour 3 went down under Sutton's management. Lopez testified that he and Duffield held several discussions with Sutton about the need to increase sales. Lopez told Sutton that he should be featuring more specials during his tour and Lopez left messages for Sutton in the managers' logbook with instructions to establish certain specials. Lopez gave some vague testimony that he had received a report that Sutton played dominoes with customers and that he left the walk-in refrigerator open, but Lopez' recollection of these matters was not firm enough to convince me that the testimony was reliable.

Duffield testified that he changed Sutton's tour at the end of March because Sutton permitted sanitation problems to develop, his employees were out of uniform, and sales were declining. When Romnel took over Sutton's tour, he put out more products for sale and these were better garnished and more attractively presented than when Sutton had been in charge. As a result, Duffield said, the sales on tour 1 increased under Romnel.

The evidence shows that in February 1994, the first month that Sutton managed tour 1 for Respondent, daily sales on

<sup>9</sup> Duffield was no longer employed by Respondent when he testified here.

<sup>10</sup> Lopez had worked for the company that had operated the cafeteria just prior to Respondent and he was aware of the sales figures for the various tours.

the tour varied from \$974.86 to \$267, with the average daily sales figure for the month being \$676.47. In March, under Sutton the daily sales varied from \$836.10 to \$171, and averaged \$546.07. For the period that Romnel took over, daily sales varied from \$781.05 to \$484.53 with an average daily sale of \$671.22. When Sutton again took over tour 1, sales varied from \$914.14 to \$369.70 and averaged \$649.97. Under Romnel, tour 3 averaged daily sales of \$935.99, but when Sutton briefly managed tour 3, the average declined to \$834.68.

Sutton testified that the sales on his tour went down due to the fact that he was not given enough food to sell and that a full breakfast was not sold until after his tour ended. Apparently, it was the duty of the tour 3 employees to prepare food to be served on tour 1. Although Lopez insisted that there was a cook on tour 1 who worked until the early hours of the morning, the records show that Ulysses, who was identified as the cook, left at midnight. Sutton stated that often the food left by the tour 3 employees was old and had become too sour to sell on his tour. Sutton said that he had informed both Duffield and Sutton that tour 3 employees did not leave him enough food and that he had frequently asked Lopez to insure that tour 3 prepared enough food for tour 1. Sutton stated that he communicated orally with Duffield and Lopez; he did not write his requests in the managers' log-book. Further, according to Sutton, customers wanted to purchase breakfast during tour 1.<sup>11</sup> Sutton said that he had suggested to Lopez that breakfast should be served during his tour. When Romnel managed tour 1 at the end of March, breakfast was served and breakfast continued to be served when Sutton resumed managing the tour.

Sutton recalled two meetings in February 1994, where Duffield told the tour managers that sales were too low for Respondent to make a profit from the cafeteria and that managers should present ideas for raising sales. In March, according to Sutton, the managers were again told that Respondent was losing money on the cafeteria.

On cross-examination, Sutton acknowledged that Lopez had frequently asked him for ideas on how to raise the level of sales and that Duffield was constantly asking him to improve sales. Sutton knew that it was important to increase sales. Sutton testified that he had indeed presented some ideas but that he had not written them in the managers' log; instead, he had presented them orally to Lopez. Sutton denied that Duffield ever told him that sales on his tour were too low, and Sutton claimed that he was never told the reason that he and Romnel changed tours in March. Sutton denied Lopez' charges that his employees were out of uniform or that his shift did not have food ready for tour 2 to sell.

The managers' log contains a number of entries concerning Sutton's performance. On March 29, Duffield wrote, "Stanley where is my jello? You don't want us to make money? Where are your ideas. Talk to me." Duffield testified that he had instructed that jello be featured in the cafeteria but that Sutton had neglected to see to it that jello was prepared and put out for sale. Sutton denied Duffield's version of this occurrence. On April 14, Duffield asked, "Stanley, please make sure that you have a breakfast special. I

would like to see a list of specials." Duffield testified that although Sutton did not respond, Lopez and Romnel had some ideas for specials. Sutton testified that he always placed a list of specials in the office. On April 19, 1994, Duffield again wrote to Sutton, "Where are your comments. This book or log is a communication tool for our management team. I'm sure you have something to say!" Duffield testified that Sutton did not respond.

According to Sutton, on March 15, 1994, Duffield and Joe White, a part owner of Respondent, informed the managers that they were bringing in a union to lower the wage rate paid to cafeteria employees. After this meeting, Duffield and White met with employees on Sutton's shift and informed them that the Company was losing money, that Local 485 was coming in and that the employees had 30 days to join Local 485. Around March 25, Sutton stated, he arrived at work to find a stack of Local 485 authorization cards and a pamphlet, together with a note from Lopez telling him that when the employees punched in he was to have the employees read the pamphlet and sign the cards. Sutton told the employees about the cards and they asked his opinion, whereupon Sutton replied that he himself would not sign a card unless he had spoken to a union representative to find out what the union had to offer. None of the employees on Sutton's tour signed cards for Local 485. Two days later, Lopez asked Sutton whether the employees had signed cards and Sutton replied that they had not yet done so. Lopez said that Duffield wanted all the cards signed by the end of the week and that whoever did not sign would be fired. When Sutton relayed this to the employees, they refused to sign the cards.

Sutton testified that sometime in April, he began hearing rumors that he was being fired. By April 20, Sutton heard that a new manager was being trained.<sup>12</sup> On April 22, Sutton testified, Duffield spoke to him at the end of his tour. Duffield said that the other managers had persuaded their employees to sign cards for Local 485 but that he had heard that Sutton told employees on his tour not to sign. Sutton denied this report; he had merely suggested that the employees speak to a union representative before they signed up. Duffield commented that it was not that important. Then, Duffield said that Sutton no longer had the intensity that he displayed at first and that he no longer seemed to care about the Company. Duffield added that Lopez had complained that Sutton had stopped listening to his instructions. Duffield said he had to change managers for the Company's sake. Sutton asked to be confronted with Lopez to refute his complaints, but Duffield said the matter was not negotiable. Duffield promised that he would give Sutton a good reference and that he would not fight his unemployment claim if Sutton made one. Sutton replied that if Duffield believed everything Lopez said and would not give him another chance, then he just wanted his last paycheck. Sutton testified that before this day Duffield had never complained to him about his individual performance. Sutton maintained that Duffield had never reprimanded him for permitting the employees to be out of uniform and had not mentioned that the kitchen area was dirty.

<sup>11</sup> The full breakfast was served on tour 2 beginning at 7 a.m.; this meal was prepared on tour 1 beginning at 6 a.m. when a chef arrived on the premises.

<sup>12</sup> Although Sutton was not specific, his entire testimony leads me to believe that the rumors must have begun in the first 2 weeks of April.

Duffield testified that he made the decision to discharge Sutton. He did so because Sutton's performance had decreased to the point where it was poor and his management skills were not up to the standard. Duffield's decision was based in part on low sales on Sutton's tour and on Duffield's observation that when Sutton switched tours with Romnel, the sales on Sutton's new tour declined and those on Romnel's new tour increased. Duffield concluded that whatever shift Sutton was managing would suffer a decline in sales. According to Duffield, when he discharged Sutton, he told Sutton that he was unhappy with his performance, citing poor sanitation, poor presentation of food, employees out of uniform, failure to manage the employees, the unhappiness of clients with food and service, and the fact that Sutton had lost his initiative. Duffield denied that he had mentioned Local 485 at Sutton's exit interview.

Duffield testified that he had never received a complaint from Sutton that there was insufficient food prepared for sale on tour 1 and he said that Sutton had not voiced any other complaints. According to Duffield, the progressive discipline system outlined in Respondent's employee handbook does not apply to managers. Duffield would not permit things to deteriorate to such a point that a manager would accumulate three written warnings before he was discharged, because a manager has a higher level of responsibility than a rank-and-file employee. Duffield rebutted Sutton's claim that he had asked to sell breakfast on tour 1; Duffield said that Romnel had first suggested serving breakfast on tour 1 when he was temporarily managing that tour during the switch with Sutton.

Duffield acknowledged that Respondent wanted to reduce the hourly wages at the cafeteria and that Local 485 had been called in for this purpose. He testified that Lopez and Romnel had obtained signed authorization cards from the employees on their shifts and that Sutton's failure to obtain cards for Local 485 was not in keeping with the goals of the Company. However, Duffield maintained that Sutton was discharged for poor performance.

For purposes of evaluating the testimony here, I find that Duffield testified truthfully to the best of his recollection. He did not evade the General Counsel's questions and he admitted freely his actions in attempting to bring Local 485 to the workplace. I shall credit Duffield's testimony. As will be seen below, I find that Sutton's recollection about the events is not exact.

The documentary evidence here as well as the testimony of other employees shows that Respondent informed its employees of the advent of Local 485 in April 1994, and that managers were given union authorization cards for the employees to sign on April 18, 1994. Thus, all of Sutton's testimony that these events occurred in March is inaccurate. It follows that Duffield's written comments to Sutton about his performance began to appear in the managers' log before Sutton was asked to obtain signed cards from the employees, and it is clear that Sutton and Romnel switched tours before any controversy over these cards arose. Thus, I find that the record establishes that Respondent was dissatisfied with Sutton's performance before the failure to sign cards for Local 485 became an issue with regard to Sutton. I have found that Duffield is a reliable witness and I credit his testimony that he complained to Sutton about his performance, citing poor sales, employees out of uniform, and poor sanitation

as well as Sutton's failure to communicate through the managers' log. I credit Duffield that Sutton and Romnel were switched to give Sutton an opportunity to demonstrate his skills on another tour and that in early April when the experiment ended, Duffield concluded that Sutton was responsible for lower sales on whichever tour he managed. I credit Duffield that Sutton never suggested that the poor results on tour 1 were due to lack of fresh food and to a need to serve breakfast. I credit Duffield that when Romnel took over tour 1 he improved the presentation of food. I find that the rumors about his impending discharge, which Sutton said began in April, took place before April 18 when Sutton was asked to obtain signed authorization cards from employees on his tour. Sutton heard that a new manager was being trained on April 20. It is clear that the process of discharging Sutton began before April 18 when he was given Local 485 cards. I credit Duffield that when he fired Sutton he did not mention Sutton's failure to have employees sign union cards. I credit Duffield's stated reasons for his decision to discharge Sutton. I find that the General Counsel has not shown by a preponderance of the evidence that Sutton's failure to make employees sign cards for Local 485 was a motivating factor in his discharge.

#### 4. Unlawful assistance to Local 485

Respondent admits that it granted recognition to Local 485 in March 1994 as the exclusive bargaining representative of the cafeteria employees and that a collective-bargaining agreement was signed with a term beginning April 8, 1994.<sup>13</sup> The uncontroverted evidence shows that Respondent brought in Local 485 not because any of its employees supported that Union, but because it wished to enter into a contract to lower its employees' wages. At no time did Local 485 represent an uncoerced majority of Respondent's employees. The testimony of Ackles is uncontradicted that on at least two occasions in April, Respondent informed its employees that they had to sign cards for Local 485 within 30 days or face termination. Respondent also told its employees that it had hired two Local 485 shop stewards. Ackles testified that in April, Lopez sent him into the manager's office to meet with Jose Torres; Torres told him he had 30 days to sign a card for the Union. Respondent thus rendered unlawful assistance and support to Local 485 in violation of Section 8(a)(2) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. By threatening its employees with reprisals for soliciting other employees to sign authorization cards for Local 100, Respondent violated Section 8(a)(1) of the Act.

2. By discharging its employee Matthew Ackles on April 28, 1994, because he engaged in activities in support of Local 100, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By threatening its employees with reprisals because they filed charges under the Act, Respondent violated Section 8(a)(1) of the Act.

<sup>13</sup> The collective-bargaining agreement sets wages, hours, and working conditions for Respondent's employees in the following unit:

All cafeteria employees employed at its Brooklyn facility, excluding all supervisors as defined in the Act.

4. By informing its employees that it was futile for them to select their own bargaining representative, Respondent violated Section 8(a)(1) of the Act.

5. By coercively interrogating its employees about their activities in support of Local 100, Respondent violated Section 8(a)(1) of the Act.

6. By issuing warning notices on July 14 and August 17 and 22, and discharging its employee Matthew Ackles on August 23, 1994, because he supported Local 100 and because he filed charges under the Act, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

7. By granting recognition to Local 485 as the exclusive bargaining representative of its employees in the unit set forth above notwithstanding that Local 485 did not represent an uncoerced majority of the employees in the unit, signing a collective-bargaining agreement, enforcing a collective-bargaining agreement from April 8 to June 7, 1994, informing its employees that they were represented by Local 485 and that they had 30 days to sign authorization cards for Local 485 or face discharge, informing employees that it had hired two shop stewards for Local 485, directing employees to sign authorization cards and read literature for Local 485, and by providing an office for Local 485 representatives to meet with its employees and permitting them to solicit its employees to sign authorization cards, Respondent violated Section 8(a)(2) and (1) of the Act.

8. The General Counsel has not shown that Respondent engaged in any other violations of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Matthew Ackles, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Ackles, having been twice discriminatorily discharged by Respondent, must be made whole for the period after his first discharge from April 28 to June 6, 1994, and after his second unlawful discharge on August 23, 1994.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

#### ORDER

The Respondent, L.A. Food and Vending Services, Inc., Somerville, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Hotel Employees and Restaurant

Employees Union, of New York, New York and Vicinity, Local 100, AFL-CIO or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Threatening any employee with reprisals for soliciting other employees to sign cards for Local 100 or any other union.

(d) Informing employees that it is futile for them to select their own bargaining representative.

(e) Issuing warning notices to, threatening reprisals against, and discharging any employee for filing charges under the Act.

(f) Recognizing, bargaining with, and signing and enforcing a collective-bargaining agreement with Local 485 or any other labor organization at a time when such labor organization does not represent an uncoerced majority of the employees in the unit as to which recognition is extended, informing its employees that they are represented by such labor organization, directing its employees to meet with representatives of such labor organization and to sign authorization cards or face discharge, informing its employees that it has hired shop stewards for such labor organization, directing its employees to read literature for such labor organization, providing an office for representatives of such labor organization to meet with its employees, and permitting them to solicit its employees to sign authorization cards.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Matthew Ackles immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail to all the employees it formerly employed at the Brooklyn cafeteria facility copies of the attached notice marked "Appendix."<sup>15</sup> Mail such copies of the notice on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>14</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>15</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Hotel Employees and Restaurant Employees Union, of New York, New York and Vicinity, Local 100, AFL-CIO or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with reprisals for soliciting other employees to sign cards for Local 100 or any other union.

WE WILL NOT inform you that it is futile for you to select your own bargaining representative.

WE WILL NOT issue warning notices to you, threaten reprisals against you, nor discharge you for filing charges under the Act.

WE WILL NOT recognize, bargain with, and sign and enforce a collective-bargaining agreement with Local 485, International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO or any other labor organization at a time when such labor organization does not represent an uncoerced majority of the employees in the unit, and WE WILL NOT inform you that you are represented by such labor organization, nor direct you to meet with representatives of such labor organization, direct you to sign authorization cards for such organization or face discharge, inform you that we have hired shop stewards for such labor organization, direct you to read literature for such labor organization, nor provide an office for representatives of such labor organization to meet with employees and permit them to solicit employees to sign authorization cards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Matthew Ackles immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

L.A. FOOD AND VENDING SERVICES, INC.